IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 81-5048

STEVEN ROY HARPER,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

THOMAS M. KENNEY,
Douglas County Public Defender,

STANLEY A. KRIEGER,
Assistant Public Defender,

306 Douglas County Hall of Justice
Omaha, Nebraska 68183

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Do the Nebraska Death Penalty Statutes violate the Eighth and Fourteenth Amendments to the Constitution of the United States in that the result is the discriminatory imposition of the death penalty?

2. Do the Eighth and Fourteenth Amendments to the Constitution of the United States require states to provide for meaningful appellate review of the uniformity of the imposition of the penalty of death?

3. Do the Nebraska Death Penalty Statutes violate the Eighth and Fourteenth Amendments to the Constitution of the United States in that they fail to provide meaningful review of the facts and circumstances surrounding the imposition of death as compared to the imposition of a sentence of life imprisonment?

4. Do the Nebraska Death Penalty Statutes violate the Sixth Amendment to the Constitution of the United States in that they fail to provide persons sentenced to death with adequate information concerning the circumstances surrounding other homicides used by the Nebraska Supreme Court in the appellate review process, thus denying such persons the effective assistance of counsel?

5. Did the imposition of the death penalty in the Petitioner's case violate the Eighth and Fourteenth Amendments in that the sentence and review thereof were a result of arbitrary and unchecked discretion of both the sentencing and reviewing panel?

6. Do the Nebraska Death Penalty Statutes violate the Eighth and Fourteenth Amendments of the Constitution in that they are unconstitutionally vague and indefinite and that appellate review has failed to correct this defect?

7. Was the trial court's ruling that constitutionally defective statements given to police by the Petitioner, while not admissible in the State's case-in-chief, be allowed in rebuttal erroneous?

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A. The mitigating and aggravating circumstances are vague and indefinite such that determining life or death cannot be applied in other than a capricious and arbitrary manner. 4

B. The aggravating and mitigating circumstances tend, in practice, to arbitrarily limit the sentencing court's consideration of factors not specifically delineated in the statute. 5

C. There is no meaningful appellate review under Nebraska statutory plan of comparing homicide cases. 7

D. The effectiveness of Petitioner's counsel is blunted by the failure of Nebraska's statutory appellate review scheme to allow counsel to review those cases and factors used by the Supreme Court of Nebraska in their review and comparison of other homicide cases. 8

E. Nebraska's sentencing procedure provides little or no standards as to the basis for sentencing by one judge or a three judge panel. 10

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IN THE SUPREME COURT OF THE UNITED STATES
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NO. _____

STEVEN ROY HARPER,

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THE STATE OF NEBRASKA,

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEBRASKA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered on April 17, 1981.

OPINION BELOW

The opinion of the Supreme Court of the State of Nebraska in the case of Steven Roy Harper is reported at 208 Neb. 568, 304 N.W. 2d 663 (1981), attached as Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Nebraska was rendered on April 17, 1981 and entered on that date. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).*

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*The Petition for Writ of Certiorari is untimely filed according to the Rules of the Court for the reason that counsel was relying on the old Rules wherein 90 days was allowed to file a Petition for Writ of Certiorari. Counsel requests the Court use its discretion, as it has in the past, to accept this capital case as timely filed for purposes of review of the Petition for Writ of Certiorari. The untimely filing of a Petition for a Writ of Certiorari to review the final judgment of the highest state court in a direct appeal of a criminal defendant's conviction and sentence is not jurisdictional. Heflin v. United States, 358 U.S. 415, 418 note 7 (1959); Taglianetti v. United States, 394 U.S. 316 note 1 (1969); cf. Smith v. Mississippi, 373 U.S. 238 (1963), Arnold v. North Carolina, 376 U.S. 773 (1964); Fuller v. Alaska, 393 U.S. 80 (1968) where this Court has granted Petitions for Writs of Certiorari untimely filed. See also appended Affidavit of counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case involves the following provisions of Nebraska law. (See Appendix B).

Neb. Rev. Stat. 1943, Reissue 1975, 28-401*

Neb. Rev. Stat. 1943, Reissue 1975, 28-420*

Neb. Rev. Stat. 1943, Reissue 1979, 29-2519 through 29-2525

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Neb. Rev. Stat. 1943, Reissue 1979, 29-2524

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STATEMENT OF THE CASE

The Petitioner was arrested on October 13, 1978 in Beaumont, Texas and held for return to Nebraska. During his detention in Texas, he was interrogated by members of the Douglas County Attorney's office and Omaha police officers who had traveled to Texas. He made admissions to the police officers at that interrogation. The Petitioner was under severe depression at the time and had attempted suicide by slashing his wrists (108-178).** Extradition was waived and he was returned to Nebraska and charges were filed by the County Attorney of Douglas County, Nebraska charging him with two counts of first degree murder and three counts of poisoning with intent to kill or maim. The Court appointed the Public Defender's office to represent the Defendant after he indicated he had no funds with which to obtain counsel. (See certified copy of Order of Appointment and Petitioner's Poverty Affidavit appended hereto).

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*These statutes have been repealed effective January 1, 1979. Section 28-401 was replaced with a like provision and Section 28-420 was eliminated as a separate provision. See Chapter 28, Neb. Rev. Stat. 1943, Reissue 1979.

**References T-# refer to page in the Nebraska Supreme Court transcript of the proceedings and references with # only refer to Bill of Exceptions of trial testimony.

Pretrial hearings were held to suppress certain statements made by the Defendant to police while in Beaumont, Texas and in Omaha, Nebraska (98-105, 181-182) and the Court ruled that the statements could not be admitted in the State's case-in-chief but could be used in rebuttal if the Defendant chose to exercise his constitutional right and testify in his own behalf (T-60, T-98).

The Petitioner also challenged the constitutionality of Nebraska's Death Penalty Statutes in a motion to the trial court (T-172) which was denied in its entirety (T-178). These issues were again raised by Petitioner in his brief and arguments to the Nebraska Supreme Court. (See Appendix A).

The Petitioner was tried and convicted of all the charges and after a determination by a three judge panel in its Order of Sentence, the Petitioner was sentenced to death on each first degree murder count and consecutive sentences of ten years and $10,000 fines each on the poisoning counts (T-180).

The conviction and sentences were appealed to the Nebraska Supreme Court which affirmed the conviction and sentences in an opinion rendered April 17, 1981.

REASONS FOR GRANTING THE WRIT

THE NEBRASKA DEATH PENALTY STATUTES DO NOT PROVIDE THE NECESSARY EFFECT OF AVOIDING ARBITRARY, CAPRICIOUS AND DISCRIMINATORY IMPOSITION OF THE DEATH SENTENCE IN THE FOLLOWING RESPECTS:

A. THE MITIGATING AND AGGRAVATING CIRCUMSTANCES ARE VAGUE AND INDEFINITE SUCH THAT DETERMINING LIFE OR DEATH CANNOT BE APPLIED IN OTHER THAN A CAPRICIOUS AND ARBITRARY MANNER.

This Court has, on many occasions, examined the question of the constitutional limits of vagueness as an element of due process. Grayned v. City of Rockford, 408 U.S. 104 (1971). In Connelly v. General Construction Company, 299 U.S. 385 (1926), this Court aptly stated that

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ in its application violates the first essentials of due process." Connelly v. General Construction Company, 299 U.S. at 391. (Emphasis added).

It cannot be denied that judges who have considered the standards in Nebraska have differed as to their meaning, the weight to be applied to each, and their application. The Nebraska Supreme Court has not sufficiently delineated these standards so as to remove their defects of vagueness. The Nebraska Supreme Court's first efforts at interpreting the language of the standards contained in Section 29-2523 were in several cases heard after Nebraska revised its statutes pursuant to this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). See State v. Simants, 197 Neb. 549, 250 N.W. 2d 881 (1977); State v. Rust, 197 Neb. 528, 250 N.W. 2d 867 (1977); State v. Stewart, 197 Neb. 497, 250 N.W. 2d 849 (1977); State v. Holtan, 197 Neb. 544, 250 N.W. 2d 876 (1977). The Nebraska Supreme Court has not made any real attempts since these cases to further define its decisions in subsequent cases appearing before it. In State v. Peery, 199 Neb. 656, 261 N.W. 2d 95 (1977), there was no discussion of any kind as to the definition of the aggravating and mitigating circumstances, but merely references to State v. Stewart, State v. Rust, State v. Holtan and State v. Simants. In State v.

Williams, 205 Neb. 56, 287 N.W. 2d 218 (1979), there was no discussion of the definitions or references to other cases. In State v. Otey, 205 Neb. 90, 287 N.W. 2d 36 (1979), the Court merely referred to the sentencing order of the trial court and stated that the trial court's findings were proper and referred to State v. Simants. In State v. Holtan, 205 Neb. 314, 287 N.W. 2d 671 (1980), that defendant's second appeal in that defendant's case from the denial of post conviction relief, no further explanation was provided but simply a reference, again, to State v. Simants. In State v. Anderson and Hochstein, 207 Neb. 51, 296 N.W. 2d 440 (1981), reference was again made to State v. Rust and to this Court's decision in Gregg v. Georgia without further clarification. The Nebraska Supreme Court's initial interpretations in 1977 were in language which was itself subject to a wide range of meanings and interpretations.

In vacating the death sentence against the defendant in Godfrey v. Georgia, 446 U.S. 420 (1980), this Court found

> "That petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than any other person guilty of murder . . . There is no principle way to distinguish this case in which the death penalty was imposed from the many cases in which it was not."

The question of the broadness of the Nebraska statute does tie in somewhat with the use of meaningful appellate review in interpreting those standards, which is discussed later. The language used in Nebraska's statutory scheme is inherently vague and overbroad and subject to any number of meanings and the Nebraska Supreme Court has not sufficiently interpreted these standards to meet the constitutional requirements set by this Court.

B. THE AGGRAVATING AND MITTIGATING CIRCUMSTANCES TEND, IN PRACTICE, TO ARBITRARILY LIMIT THE SENTENCING COURT'S CONSIDERATION OF FACTORS NOT SPECIFICALLY DELINEATED.

While Nebraska's statutory scheme provides "guidelines" for the sentencing authority, as a practical matter, the effect of these standards is to either consciously or by subliminal suggestion limit

the options specifically considered by the sentencing judge or panel. This is obviously more relevant for the Petitioner in the consideration of mitigating factors.

Section 29-2521 provides that

> "Evidence may be presented as to any matter the Court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in Section 29-2523 . . ." (Emphasis added).

It is counsel's position that the "any . . . evidence" which is referred to above does not amount to a "mitigating circumstances" which is required to be considered. The result is an unconstitutional restriction on the right of the Defendant to have, in his behalf, all mitigating circumstances in his favor determined by the sentencing judge or panel. The Nebraska Supreme Court has specifically endorsed the distinction between "mitigating factors" and "mitigating circumstances". In State v. Holtan, 205 Neb. 314, 287 N.W. 2d 671 (1980), the Nebraska Supreme Court stated

> "The trial court shall, in addition to the aggravating and mitigating circumstances . . . likewise consider any matter relevant to the imposition of sentence and will receive any such evidence which the court deems to have probative value as the character of the defendant, and shall consider them as a mitigating factor though not specifically a mitigating circumstance as set forth in Section 29-2523." State v. Holtan, 205 Neb. at 318-319. (Emphasis added).

This situation needs review by this Court for a number of reasons, some of which are discussed in this Court's decisions in Lockett v. Ohio, 438 U.S. 586 (1978) and Bell v. Ohio, 438 U.S. 637 (1978), wherein this Court held that preclusion of consideration of relevant mitigating circumstances is unconstitutional. Under the Nebraska Supreme Court's interpretation, while the trial court may consider mitigating "factors", it may not consider them specifically as mitigating circumstances which are, in effect, used by the sentencing judge or panel in weighing whether life or death shall be imposed.

The sentencer is left with no guidelines as to how to consider or weigh mitigating "factors" in relation to mitigating circumstances

and this destroys the concept that "on a matter so grave that the determination of whether a human life should be taken or spared (sentencing) discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153 (1976).

Counsel postulates the reality that while a sentencing judge or panel may consider "factors", in effect, the determination is made upon the listed "circumstances" contained in Section 29-2523 to the effect of exclusion of the so-called "factors".

C. THERE IS NO MEANINGFUL APPELLATE REVIEW UNDER NEBRASKA STATUTORY PLAN OF COMPARING HOMICIDE CASES.

A grievous defect in Nebraska's statutory scheme, and one which runs as a thread throughout the arguments raised herein, is the deficiency in Nebraska's procedure and practice in appellate review. Because of this Court's heavy emphasis in appellate review to insure that the situation does not exist wherein "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" (Furman v. Georgia, 408 U.S. 238 at 313 (1972)) the Nebraska Legislature created Sections 29-2521.01 through 2521.04, 29-2522, 29-2524 and 29-2524.01 through 2524.02. These statutes purport to require the Nebraska Supreme Court to review all cases of "criminal homicide" after April 20, 1973, the effective date of the "new" death penalty statute. The words "criminal homicide" clearly encompass in plain language crimes other than those of first degree murder. The obvious direction of this Court in its decisions and also in the Nebraska amendments to its statute concerning the Nebraska Supreme Court review, is to insure "reliability" and "uniformity" in the determination of the death sentence. Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977).

The Nebraska statute on comparative review addresses itself to the issues raised by this Court in its decisions which seem to accept the proposition that capital cases require special treatment

due to the qualitative difference of the penalty of death and the subsequent need to insure reliability and uniformity in sentencing.

However, the Nebraska Supreme Court has consistently refused to follow the plain language of these statutes and has allowed sentencing based only on the consideration of the case before it with other death penalty cases in Nebraska subsequent to April 20, 1973. This type of appellate review cannot meet the requirements this Court has set in Godfrey v. Georgia, supra. The result of the Nebraska Supreme Court's conscious and deliberate refusal to consider "all criminal homicides" renders any judgment on the penalty of death unconstitutional since there has been no meaningful appellate review, either under the statutory scheme or under the constitutional requirements as set forth by this Court. Counsel's position herein has been previously voiced by the lone dissents in recent Nebraska capital cases by its Chief Justice. State v. Peery, supra; State v. Williams, supra; State v. Otey, supra; State v. Holtan, supra; State v. Rust, 208 Neb. 320, 303 N.W. 2d 490 (1981). (This is the appeal from that defendant's denial of post conviction relief.) In the Petitioner's case before the Nebraska Supreme Court, the Chief Justice stated that

> "I have now concluded that under the limitations imposed upon courts by both the federal and state constitutions the imposition of the death penalty as now applied in most other instances is arbitrary and capricious and not permitted." State v. Harper, 208 Neb. at 581.

The Chief Justice, by actually comparing the Petitioner's case with other criminal homicides rather than just capital cases, came to the inescapable conclusion from his analysis that in fact the Petitioner in this case has been arbitrarily and capriciously sentenced to death.

This Court should review the Nebraska appellate review scheme which has failed to comply with the requirements of this Court's decisions and due process.

D. THE EFFECTIVENESS OF PETITIONER'S COUNSEL IS BLUNTED BY THE FAILURE OF NEBRASKA'S

STATUTORY APPELLATE REVIEW SCHEME TO ALLOW COUNSEL TO REVIEW THOSE CASES AND FACTORS USED BY THE SUPREME COURT OF NEBRASKA IN THEIR REVIEW AND COMPARISON OF OTHER HOMICIDE CASES.

The Nebraska statutory scheme for comparison of other criminal homicides discussed in the preceding argument does not only fail in its accomplished purpose as stated above but in addition, in its attempted implementation by the Nebraska Supreme Court, has failed to provide counsel for Petitioner with any input into the process by which these cases are compared by the Nebraska Supreme Court. Especially in a capital case, there should be no stone left unturned to insure that the Petitioner is adequately represented and has an opportunity to express his view, through counsel, prior to any determination as to the adequacy of the penalty of death. In this regard, counsel should have an opportunity to review those cases which the Supreme Court of Nebraska will use as a basis of comparison and counsel should have an opportunity to provide to the Court the Petitioner's position as to these cases in comparison to his. If, as is the case, the Nebraska Supreme Court summarily and without explanation simply states a comparison has been made and affirms the Petitioner's sentence, is not the Sixth Amendment offended by the lack of the ability of counsel to review those cases that the Supreme Court of Nebraska is using as a factual basis for their comparison?

In the context of a capital case, this must be as critical a stage in the proceeding as any. In fact, it may even be more critical than in the stages preceding it since by the time appellate review is initiated, the spector of the death sentence and its awaiting implementation are realities impinging themselves on every move of the Petitioner and his counsel. The practical effect of a denial of counsel for the Petitioner to adequately present his client's case to the Nebraska Supreme Court is a matter which should be reviewed.

E. NEBRASKA'S SENTENCING PROCEDURE PROVIDES LITTLE OR NO STANDARDS AS TO THE BASIS FOR SENTENCING BY ONE JUDGE OR A THREE JUDGE PANEL.

The Nebraska statutory scheme provides no standards of any kind as to whether the Defendant should be sentenced by a single judge or by a three judge panel. This Court, as mentioned previously, is concerned with the "reliability" and the "uniformity" of sentencing and insuring that the situation does not exist wherein there is "no meaningful basis for distinguishing the few cases in which it (death) is imposed from the many cases in which it is not". Furman v. Georgia, supra, at 313.

A decision of the trial judge to convene a three judge panel or to sentence the Defendant himself is without any restraint whatsoever in Nebraska and the Court has, in effect, total and unbridled discretion. It is obvious that there could be a substantial difference in the determination of sentences imposed by a single judge or three. The Defendant is placed in an unjustified position of having no information as to what determination the trial court has made in its decision to impanel or not to impanel a three judge panel. One may argue that chances of a death penalty being imposed are greater with a three judge panel where the responsibility is shared rather than with a single judge. If that would be the case, a defendant's chances of having the death sentence imposed would be greater if a three judge panel was imposed. Certainly, if this was the case, the Defendant should have the opportunity to determine what standards the trial court is using to come to its decision to impose the sentence by a single judge or a three judge panel.

There may be also a situation where a single judge may be bent on imposing the death penalty and, therefore, not impanel two other judges to hear the case with him. Likewise, since there are no standards, the Defendant is powerless to challenge that result. Due process and the need for reliability and uniformity should require standards and guidelines which are available to the Defendant and to the trial court in determining whether a three judge panel or a single judge should impose the penalty of death.

F. IN A CAPITAL CASE, A STATEMENT OBTAINED IN VIOLATION OF DUE PROCESS AND HELD INADMISSIBLE ON THAT BASIS IN THE STATE'S CASE-IN-CHIEF SHOULD NOT BE ALLOWED TO BE USED AS EVIDENCE AGAINST THE PETITIONER IN REBUTTAL.

An incriminating statement was taken from the Petitioner by Omaha police officers while he was in Beaumont, Texas subsequent to his arrest, and another while in detention in Omaha just outside the courtroom. It was virtually agreed and conceded by the prosecution that the statements were obtained in violation of due process and could not be used in its case-in-chief but the trial court held that they could be used in rebuttal if the Defendant testified.

In a capital case, a statement obtained in violation of due process in this Court's requirements in Miranda v. Arizona, 384 U.S. 436 (1966) and its progeny should be inadmissible either in the State's case-in-chief or in rebuttal. The need for special consideration in capital cases is necessary from the very nature of the penalty imposed. Why should the Petitioner have been required to remain silent in order to protect from the jury statements given to police officers which were admittedly obtained by the prosecution unlawfully? This goes beyond the question of voluntariness and trustworthiness. Harris v. New York, 401 U.S. 222 (1971); Oregon v. Haas, 420 U.S. 714 (1975). It goes also to the constitutional right of a capital defendant to present his defense without fear that a statement taken from him by methods violating due process would be used against him.

Clearly in this case, the Petitioner was under a most extreme mental and psychological distress at the time of his interrogation and in fact had made a suicide attempt. In addition, the police exploited this situation by getting expert psychiatric advice and playing their hand so as to use the psychiatric profiles to obtain the statement from the Defendant. One must view this with the knowledge that the State, through the Deputy County Attorney who both tried the case and who was present in Beaumont, Texas with the police officers at the time of the statement, conceded its inadmissability. Certainly, the Deputy County Attorney must have been aware of that

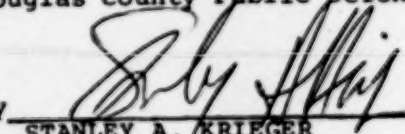
at the time statements were obtained. To allow this type of situation, the possible admissibility of the statement on rebuttal, to effect the Defendant's decision to testify in a capital case is a question which ought to be reviewed by this Court to determine if this type of restriction upon the Defendant is constitutional.

CONCLUSION

For all of these reasons, Petitioner respectfully urges this Court to grant his Petition for Writ of Certiorari to the Supreme Court of Nebraska.

Respectfully submitted,

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STATE OF NEBRASKA, APPELLEE, V. STEVEN ROY HARPER, APPELLANT.

__N.W.2d__

Filed April 17, 1981. No. 43070.

1. Death Penalty: Constitutional Law. The Nebraska death penalty statutes, Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1979), do not violate the provisions of the U.S. or Nebraska Constitutions.
2. Death Penalty: Words and Phrases. In the context of Neb. Rev. Stat. Ch. 29, art. 25 (Reissue 1979), the word "sentence" in § 29-2521.03 is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable only in a case where a sentence of death has been imposed.
3. Death Penalty. Where a death sentence has been imposed and the Supreme Court is required to determine the propriety of that sentence in such case, the determination of which previous first degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis.
4. Criminal Law: Evidence. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

MCCOWN, J.

The defendant was found guilty on two counts of first degree murder and three counts of poisoning with intent to kill, wound, or maim. After hearings on the constitutionality of the death penalty and the existence of aggravating and mitigating circumstances, a sentence of death was imposed on each of the first degree murder counts and consecutive sentences of 10 years each were imposed on the poisoning counts.

In 1973-74 the defendant, Steven R. Harper, was involved in an emotional relationship with Sandra Johnson, a woman whom he had known since high school. In late 1974 the relationship deteriorated and Sandra told the defendant she intended to marry Duane Johnson. Sandra and Duane Johnson were married January 17, 1975. A few days later defendant attempted to persuade Sandra to annul her marriage, and when she refused defendant threatened to kill both Sandra and Duane.

On June 21, 1975, Sandra and Duane Johnson and several other members of their family were outdoors at the residence of Sandra's mother, Jean Betten. The defendant drove up to the residence and, after some argument, fired a shotgun at the group and Sandra's mother and brother were struck by shotgun pellets. As a result of the shooting incident the defendant was arrested, charged, and convicted of shooting with intent to kill, wound, or maim. He was sentenced to imprisonment in the penal complex. On November 16, 1977, defendant was paroled, and returned to Omaha.

On March 3, 1978, defendant commenced work at the Eppley Research Institute in Omaha, Nebraska. His job was to take care of the animals which the institute was using in connection with cancer research. While he was employed there the defendant had access to various carcinogenic drugs. . .

While working at Eppley the defendant lived in his parents' home in Omaha. On August 7, 1978, the Harper family took a dog to the veterinarian clinic and a cat on the next day. Both animals were suffering from symptoms of some type of poisoning which the veterinarian stated he had never seen before. Both animals were treated without success and both died within a few days. Shortly thereafter, on August 18, 1978, the defendant resigned his position at the Eppley Research Institute.

On Saturday, September 9, 1978, Sandra and Duane Johnson were living in a residence on Fontenelle Boulevard in Omaha, Nebraska, with their two children, a son, Michael, who was 3 months old, and a daughter, Sherry, 2 years old. Sandra's sister, Susan Conley, also lived with the family. The Johnson family and Susan left the home around 8 p.m. on Saturday, September 9, and the family returned home at about 1 a.m. on the morning of September 10. At about 6 a.m. Susan Conley went to the refrigerator and tasted the lemonade from a pitcher but it tasted strange so she spit it out. She then had a piece of pecan pie and poured herself a glass of milk. The milk also tasted odd so she spit it out, too, and dumped the rest of the milk in the sink. Later that morning Sandra and Duane and their daughter, Sherry, got up. Sandra prepared some cereal with milk for Sherry. Duane had a glass of milk and Sandra had nothing to eat or drink.

Immediately after eating her cereal Sherry complained of a stomach ache. Sandra thought nothing of it and she and Sherry went to a shopping center. Sherry suddenly began to vomit and Sandra and Sherry returned home. Meanwhile, Harold Betten, Sandra's father, and Elaine Betten, Sandra's stepmother, had stopped at the Johnson home for a visit. The Bettens had coffee and Harold Betten saw Duane Johnson drink two glasses of some sort of liquid from the refrigerator. Neither of the Bettens had any milk or lemonade. The Bettens were leaving as Sandra and Sherry returned home. Shortly thereafter, Duane became sick and began vomiting, and by noon both Duane and Sherry were quite ill and both were in bed.

About 2 p.m. Sandra's sister, Sallie Shelton, her husband, Bruce Shelton, and their 11-month-old son, Chad, stopped at the Johnson home for a visit. They stayed approximately an hour and they split a glass of lemonade between them. Neither Sandra nor her 3-month-old son, Michael, drank milk or lemonade that day. By evening Duane Johnson, Sherry Johnson, Bruce Shelton, Sallie Shelton, and Chad Shelton were all very ill. Chad Shelton was taken to the hospital on Tuesday, September 12, and died on Thursday, September 14, 1978. His doctors thought the problem might be Reye's syndrome. Duane Johnson was taken to one doctor on September 13 and to another doctor the next day, at which time he could not walk and was incoherent. He was taken to the hospital and died September 15, 1978.

At that point, with two persons dead and three others extremely ill, the Johnson household was investigated by medical authorities for toxic substances, without any success. Autopsies were performed on the bodies and on Monday, September 18, 1978, a meeting of some 20 doctors and public health officials was held to discuss the situation. They determined that on September 10, 1978, 10 people had been in the Johnson household and 5 of them, within 8 days, were either dead or ill while the other 5 were apparently healthy. Of the 5 people who were affected, all of them drank either milk or lemonade while at the Johnson household. Of the 5 who were not affected, none of them had consumed any milk or lemonade at the Johnsons on that day. At this point the matter was brought to the attention of the Omaha police.

The police began a homicide investigation. They discovered, among other things, the 1975 shooting incident and they received a report from the Center for Disease Control in Atlanta, Georgia, which indicated that whatever the substance was which had killed Chad Shelton and Duane Johnson, it was of a toxic nature and might well have been some type of carcinogenic drug. The report suggested checking with the Eppley Research Institute. The director, after having the situation explained to him, suggested the substance dimethylnitrosamine as the possible toxic agent. Dimethylnitrosamine is a carcinogen used to induce cancer in the liver.

With the evidence which the police had by that time, they obtained a warrant to search the defendant's home on October 3, 1978. The search revealed several empty animal cages of the type used at Eppley and two empty vials of the kind used at Eppley. Tests revealed that one vial had contained a mixture of a salt of arsenic and dimethylbenzanthracene, and the other vial contained dimethylaminobenzaldehyde. One was a carcinogen which was stored, along with dimethylnitrosamine, in a locked refrigerator on the sixth floor of the Eppley Research Institute in an area where the defendant had worked. The key was in a receptacle next to the refrigerator.

In a long series of tests and detailed studies and by the testimony of medical forensic experts, the toxic substance which killed Chad Shelton and Duane Johnson and poisoned the other three individuals was identified as dimethylnitrosamine, a carcinogen. Dimethylnitrosamine is an extremely toxic liquid, comparatively tasteless and lethal in small quantities, which attacks the liver and disrupts the blood clotting mechanism.

Following the search of the defendant's home a warrant for his arrest was issued. On October 13, 1978, the defendant was arrested in Beaumont, Texas, and later returned to Nebraska for trial.

At the trial William Trout, a former inmate at the penal complex who became acquainted with the defendant during the defendant's imprisonment for the 1975 shooting incident, testified as a witness for the State. Trout testified that while he and the defendant were together at the penal complex the defendant told Trout that he had tried to kill his girl friend and that if he could not have her no one could.

Trout was sent to Omaha, Nebraska, on work release detail about May 1, 1978, and at that time renewed his friendship with the defendant, who had been previously paroled in November 1977. Trout saw and visited with the defendant five or six times during the summer of 1978 and also talked to the defendant on the telephone from time to time.

Trout testified that in early June 1978 in one of their conversations the defendant told Trout that in his job he had access to some very lethal drugs which would be extremely effective for use in murder. The defendant indicated to Trout that he wanted to use the drugs to kill his former girl friend. In another conversation the defendant also told Trout that he had subjected his family cat and dog to the drugs and both had died. Trout also testified that in the last conversation that he had with the defendant while in Omaha, which occurred on Labor Day weekend 1978, the defendant said he was going to enter his girl friend's house and poison the food. The defendant told Trout that he would put the substance in something in the refrigerator which would disguise the taste of the drug.

Trout was placed on final parole September 13, 1978, and went to California on the same day. Trout testified that on October 3, 1978, he received a telephone call from the defendant from Beaumont, Texas, in which the defendant told Trout that he was about to be arrested. When Trout asked why, the defendant told him that he had gone to his former girl friend's house and put the substance in the food and that there were deaths in the family and defendant had left Omaha because he was under suspicion.

Trout did not offer any information to the police, although he knew of the crime by reading the Omaha newspaper. Trout testified under a promise that no charges would be filed against him. The defendant did not testify at the trial. One witness testified for the defense that she was with the defendant in a bar from approximately 7 p.m. September 9, 1978, until 2 a.m. September 10, 1978.

The jury found the defendant guilty on all counts. A sentence of death was imposed on each of the first degree murder counts and consecutive sentences of 10 years' imprisonment on each of the poisoning counts, and this appeal followed.

The major portions of the defendant's arguments on appeal are directed at the constitutionality of the death penalty and the constitutionality of the statutes of Nebraska dealing with its imposition. Virtually all of the defendant's challenges have been dealt with previously by this court, including the issues of aggravating and mitigating circumstances set out in Neb. Rev. Stat. § 29-2523 (Reissue 1979). We see no point in reviewing these principles again. See, *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980).

The defendant contends that the case of *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), raises additional issues as to whether the defendant's conduct in the present case was especially heinous, atrocious, and cruel, or manifested exceptional depravity. In *Godfrey* the victims died instantly when shot and no other assault or infliction of physical pain preceded the death of either victim. The single aggravating circumstance found by the Georgia court to be present was that the killing was "outrageously or wantonly vile, horrible, and inhuman." In applying the facts of the case to the aggravating circumstances finding under rules previously set down by the Georgia court, the Supreme Court of the United States found no way to distinguish the *Godfrey* case in which the death penalty was imposed from the many cases in which it was not. We believe there is little or no relationship between *Godfrey* and the case at bar.

In the case now before us the sentencing court found four specific statutory aggravating circumstances present and no mitigating circumstances. The District Court found: (1) The defendant had previously been convicted of another crime involving the use of violence to the person; (2) The murders were especially heinous, atrocious, and cruel, and manifested exceptional depravity by ordinary standards of morality and intelligence. In that respect the court found that the murders of Duane Johnson and Chad Shelton were both "conscienceless" and "pitiless" and were "unnecessarily torturous to the victim." After detailing the physical facts, the court found that each of the victims had died a slow and agonizing death, and

that the imposition of extreme suffering on each of them resulted from the defendant's acts. The trial court also found that the murders were so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life; (3) At the time the murder was committed the defendant also committed another murder; and (4) The defendant knowingly created a great risk of death to at least several persons. The sentencing court found no mitigating circumstances present, and we can find no error in the sentencing court's assessment of either the aggravating or the mitigating circumstances. *Godfrey* has no application to the case at bar.

The defendant also urges us to reconsider our interpretation of 1978 Neb. Laws, L.B. 711, codified as part of Neb. Rev. Stat. Ch. 29, art. 25 (Reissue 1979), as to which homicide cases will be reviewed, analyzed, and compared in a case where a sentence of death has been imposed. We decline to do so and we reaffirm our holdings in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

The obligation of this court to determine the propriety of a death sentence in each case and to determine which prior first degree murder cases involve the same or similar circumstances embodies the exercise of the constitutionally imposed duty of the judiciary to determine in each case whether the conviction was lawful and whether a death sentence was legally and constitutionally imposed. Under the Constitution, so long as the death penalty is authorized by law and its imposition is left, under law, to the discretion of the judiciary, the ultimate determination of whether the death penalty was legally and constitutionally imposed in any case must remain a matter for judicial rather than legislative determination.

The defendant next contends that the trial court erred in ruling that certain statements of the defendant, taken in violation of *Miranda* requirements and inadmissible in the State's case-in-chief, could be used for impeachment of the defendant on rebuttal if a proper foundation were laid. The defendant asserts that except for the erroneous ruling of the trial court, the defendant would have testified at trial.

The statements involved were inculpatory, one of them having been made in Beaumont, Texas, on October 13, 1978, and one made in Omaha, Nebraska, on January 8, 1979. On both occasions the police knew that the defendant was represented by counsel and that counsel had directed that there was to be no interrogation. The statements were obtained after the defendant had repeatedly refused to make a statement without the presence of his attorney. In connection with at least one statement the police promised the defendant that any statement made would never be used against him. At the hearing on the motion to suppress the District Court quite properly suppressed both statements and they were not admitted at the trial.

The U.S. Supreme Court has held that a statement of a defendant taken in violation of *Miranda* and, therefore, inadmissible in the case-in-chief may be used for impeachment purposes to attack the credibility of defendant's trial testimony if its trustworthiness meets legal standards. *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971); *Oregon v. Hass*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975). We see no reason to extend the rule in Nebraska beyond the constitutional requirements laid down by the Supreme Court of the United States in *Harris* and *Hass*. In the case at bar, however, the issue is not properly before us. The trial court's ruling as to the admissibility of the statements in rebuttal was prospective only and the statements were never offered or admitted at trial for any purpose.

The defendant also contends that the court erred in failing to grant a mistrial because of improper comments by the prosecutor in closing argument. During the final summation to the jury the prosecutor said: "Another aspect of the thing is that whoever did this — It's — It's not a secret that these people are sick, and it's not a secret that people have died. All along, you know, the person that did it can do one thing. He can say 'Yeah, substance used was this, so I'm going to help . . . .'" At this point the defense objected and moved for a mistrial. The trial court denied the motion for mistrial and immediately instructed the jury to disregard the statement. At the conclusion of the trial, as a part of the comprehensive instructions, the jury was specifically instructed that they were to draw no conclusions or inferences from the fact that the defendant had not testified in the case and that they were entitled to draw no conclusions or inferences as to his reasons in that regard.

The defendant relies upon the holding in *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), which forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. We do not condone comment by the prosecution on the silence of the accused, whether the comment is direct or indirect, but under the circumstances here, where the evidence of guilt was overwhelming and the trial court specifically struck the comment and instructed the jury to disregard the statement and later gave a correct and proper instruction on the failure to testify, we are constrained to find that the error, if any, was not prejudicial within the meaning of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The defendant also contends that the trial court erred in admitting evidence of the 1975 shotgun assault. Under Neb. Rev. Stat. § 27-404 (Reissue 1979), evidence of other crimes, wrongs, or acts may be admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In the case at bar the evidence of the 1975 crime was clearly admissible under the statute. See *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981).

The final issue in the case at bar is whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See Neb. Rev. Stat. § 29-2522 (Reissue 1979).

We have previously noted that the sentencing court found four statutory aggravating circumstances present and no mitigating circumstances. The defendant was a 25-year-old college graduate at the time these crimes were committed. His only prior criminal conviction was for the 1975 incident shown in the record here. The sentencing court meticulously considered each of the statutory aggravating and mitigating circumstances and made written findings of fact based upon the records of the trial as required by statute. Some of those findings have been previously set out. The sentencing court's finding that the murders of Duane Johnson and Chad Shelton were so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life appropriately summarizes the facts of this case.

Our review of first degree murder convictions finds no case which is factually comparable to the case at bar. Any objective weighing and balancing of aggravating and mitigating circumstances and comparison to the other death penalty cases now pending in this state establishes that the death sentence in the case now before us is not excessive or disproportionate to death penalties imposed in other death penalty cases under any measure of comparison.

The defendant's remaining assignments of error are without merit and the convictions and sentences are affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

I find that once again, I must in part concur with and in part dissent from the majority in its decision concerning the proper disposition of a case involving the commission of a first degree murder. See, *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Peery*, 205 Neb. 271, 287 N.W.2d 71 (1980); *State v. Rust*, *ante* p. 320, ___N.W.2d___ (1981).

I concur with the majority's finding that the judgment of conviction should be affirmed, and likewise concur with the majority's conclusion that the trial court did not err regarding the admitting into evidence of certain statements made by the appellant. I likewise concur in the majority's conclusion that the trial court did not err in refusing to declare a mistrial because of allegedly improper comments by the prosecutor in closing argument.

With regard to the matter of the admissibility of the evidence of the 1975 gunshot assault, I likewise concur with the majority that in the instant case the evidence of the 1975 gunshot assault was relevant to prove motive and, therefore, admissible under the provisions of Neb. Rev. Stat. § 27-404 (Reissue 1979). I do not, however, believe that we should leave the impression that merely because evidence may in some manner be relevant to any one of the various noted exceptions, though the prosecution does not know which one, such evidence of prior or subsequent crimes is always admissible. See dissent of Krivosha, C.J., in *State v. Ellis*, *ante* p. 379, 399, ___N.W.2d___, ___ (1981).

It is with regard to the imposition of the death penalty in this case that I must dissent. My disagreement with the majority is not because I do not believe the crime committed to be atrocious and deplorable. Quite to the contrary, I believe the crime to be flagrant and shocking. But emotions may never cancel the Constitution.

I remain firm in my view that the imposition of the death penalty is not, per se, cruel and unusual punishment in violation of the eighth amendment. *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). I likewise remain firm in my belief that the imposition of the death penalty is not immoral or unethical. See dissent in *State v. Williams*, *supra*.

Moreover, I am now convinced that there are indeed some instances, though extremely limited, when the imposition of the death penalty is constitutionally permissible. I believe that "killers for hire" may be executed as a consequence of their conviction. See *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980). There may be other limited categories which have not as yet been presented to the court for consideration. As to those, I shall reserve comment at this time.

However, I have now concluded that under the limitations imposed upon courts by both the federal and state Constitutions, the imposition of the death penalty as now applied in most other instances is arbitrary and capricious and not permitted.

As I noted in my dissent in *State v. Rust*, *supra*, even disregarding the provisions of 1978 Neb. Laws, L.B. 711, now Neb. Rev. Stat. §§ 29-2521.01 et seq. (Reissue 1979), the death penalty is generally in violation of one's constitutional rights prohibiting the imposition of the death penalty in an arbitrary and capricious manner.

In *State v. Rust, supra* at 327, ___N.W.2d at ___, I observed: "A reading of the various opinions rendered in the case of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), makes it manifestly clear that the adoption of statutes such as Neb. Rev. Stat. § 29-2522 (Reissue 1979), and the provisions of L.B. 711, are simply a response to the United States Supreme Court's recognition that it is a violation of an individual's constitutional rights when the decision to execute is arrived at in an arbitrary and discriminatory manner. The fact that we may create criteria to aid us in imposing the death penalty does not overcome the constitutional prohibition if, after applying the formula, *we nevertheless continue to impose the penalty in an arbitrary and capricious manner.*" (Emphasis supplied.)

I believe that the language of the majority opinion in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), though not reaching my present conclusion, does in fact support that conclusion. It reads in part as follows: "While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.' [Citation omitted.]

"Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 188-89.

As I have noted, examining a host of cases decided within this jurisdiction makes it clear to me that the imposition of the death penalty in most cases in this state is indeed arbitrary and capricious. See analysis of cases in dissent, *State v. Williams, supra*, and *State v. Rust, supra*.

Not only does an analysis of those cases referred to in *Williams* and *Rust* lead one to the inescapable conclusion that the imposition of the death penalty is arbitrary and capricious, but a further examination of those cases in which a charge of second degree murder is filed, rather than first degree murder, likewise makes it clear that by the time a case comes to this court for examination there have been a sufficient number of arbitrary decisions made so as to make impossible the imposition of the death penalty in anything other than an arbitrary and capricious manner. While I do not for a moment question the right of the prosecutor to elect the charge to be filed, nor do I for a moment urge any change in that process, I likewise cannot ignore its existence in attempting to rationally analyze whether the death penalty can be imposed in anything other than an arbitrary manner except in very rare instances. I am not unmindful of the fact that this argument has already been rejected by the majority in the *Gregg* case. Nevertheless, I believe that in this report the majority in *Gregg* is totally in error.

One need only examine two of the cases released by this court this day to note how the matter of prosecutorial discretion of necessity results in the death penalty being arbitrarily imposed. In addition to this case where the penalty of death was imposed, we have this day also announced our decision in the case of *State v. Stranghoener, post* p. ___, ___N.W.2d___ (1981). In that case we have affirmed a sentence of 20 years given to Stranghoener for second degree murder. The facts of the case, however, indicate to me that the appellant was, indeed, guilty of first degree murder. The facts in the *Stranghoener* case disclose that Stranghoener, together with several other individuals, carefully, cruelly, and viciously planned the execution of one Jim Goslee, a member of their "family," for no other reason except to test the loyalty of another member of the "family." Stranghoener, though originally charged with first degree murder, was permitted as a part of a plea bargain to plead to the lesser charge of second degree murder and was sentenced to prison for 20 years. While one does not question or quarrel with the right of either the prosecution or the trial court in *Stranghoener*, it is impossible to set this case alongside those cases in which the death penalty has been imposed and discern a rational distinction.

Moreover, the *Stranghoener* case is not an isolated instance. An examination of only a few cases decided since 1973 establishes clear examples of how the imposition of the death penalty in a particular case is mere happenstance. In the case of *State v. Wredt, ante* p. 184, 302 N.W.2d 701 (1981), the defendant was permitted to plead guilty to second degree murder of his father. The evidence discloses that the defendant was 16 years old at the time of the commission of the crime. On the evening of the murder the defendant took a .45-caliber revolver outside and waited for his father to come home, which he did shortly after 6 p.m. After the father got out of his truck and started walking toward the house, the defendant stepped out from the corner of the house, aimed and cocked the revolver, and fired one shot into his father's chest which killed him instantly.

In *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980), the defendant was permitted to plead guilty to second degree murder as a result of a plea bargain arrangement and was sentenced to a term of 16 to 20 years in the penal complex. Defendant had originally been charged with six felony counts, including one count of first degree murder, one count of felony murder, three counts of burglary, and one count of escape. The killing was of a police officer apparently seeking to apprehend defendant in connection with the burglary.

In *State v. Thompson*, 199 Neb. 67, 255 N.W.2d 880 (1977), the defendant was permitted to plead guilty to a charge of second degree murder after the State amended the complaint originally charging the defendant with first degree murder. He was sentenced to life imprisonment. The defendant had attended a party at the home of his sister. During the evening an argument developed, a fight broke out, and several guests subdued the defendant by getting him down on the floor. The defendant worked until noon the following day, purchased a .22-caliber semiautomatic rifle and some ammunition, and then returned to his apartment. At about 8 p.m. his niece and sister came to see him. The defendant told them he was going to kill someone, whom he described. Later that evening the defendant walked into his sister's house, carrying the loaded rifle. There were a number of people in

the house, including the victim. The defendant pointed the gun at a Mrs. Hicks and said he wanted to talk to her about what had happened the night before. He also pointed the rifle at several other persons in the room. A brief fight ensued, and after it was broken up the victim started to leave the room when the defendant shot him, striking him in the chest near his right shoulder, severing his trachea and several arteries. The victim died almost instantaneously.

In *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974), the defendant was charged with first degree murder and pled guilty to a reduced charge of second degree murder. He was sentenced to life imprisonment. The evidence discloses that the defendant broke into a residence in the early morning, picked up a knife from the kitchen table, then entered the bedroom of a 2-year-old child. When the 2-year-old cried out, the defendant stabbed him twice in the chest, causing his death.

In the case of *State v. Reyes*, 192 Neb. 153, 219 N.W.2d 238 (1974), the defendant was permitted to plead guilty to second degree murder pursuant to a plea bargain. He was sentenced to 20 years' imprisonment for the killing. The evidence discloses that the defendant approached the victim on a street corner where he had been standing with a 6-pack in each hand. The defendant shot the victim five times, killing him instantly.

The cases cited above are simply those which were appealed to this court and therefore found in the Nebraska Reports. We have no quick way of determining how many more cases of this nature can be found by examining the various District Court records. To be sure, the appealed and reported cases are not the only instances where this disparity occurs.

While I have already acknowledged that such variances and discretion are not within the control of the courts, and should not be within the control of the courts, I, nevertheless, cannot ignore the reality of those matters in attempting to determine whether the death penalty is imposed in a nonarbitrary and noncapricious manner in this state.

The words of Mr. Justice Stewart in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), seem most applicable to this analysis. At 309-10, he said: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." I likewise must conclude that the Constitution of the United States and the Constitution of the State of Nebraska cannot tolerate the infliction of a sentence of death to be so wantonly and so freakishly imposed. Recognizing the system to be what it is, and further recognizing that the system must at least for the present remain as it is, I find no other alternative but to conclude that the Constitution of the United States and the Constitution of the State of Nebraska preclude the imposition of the death penalty except in but a few extremely isolated cases.

However, I wish not to be misunderstood by what I have said here. I do not believe that persons convicted of murder should be quickly forgiven and returned to society. Quite to the contrary, I believe that having acted like an animal in the commission of the crime, they should now be restrained as an animal during the balance of their lives. If it is indeed punishment we seek to impose, and I find no fault with that, then requiring them to live out the balance of their lives in a 9- x 6-foot cell, isolated from civilization and any of the benefits of freedom, would indeed be an appropriate punishment.

For me, the question is not whether the convicted should be punished but, rather, whether the form of punishment is permitted under the Constitution. Having now attempted for more than 2 years to glean any reasonable pattern in which one is either selected to be charged with first degree murder or selected to be executed, and being unable to do so, I must conclude our selection process is arbitrary and capricious and therefore invalid. The fact that we act arbitrarily in accordance with standards which we have established to aid us in making our decision, but which in fact repeatedly fail, does not cure the constitutional defects in the scheme.

Concluding, as we have, that all persons who have been ordered executed are treated alike does not address the issue. Discrimination is determined by examining the entire class and not just those who are discriminated against. The class is persons who have unlawfully killed and not persons sentenced to death. That is what §§ 29-2521.01 et seq. seek to address.

I would sentence the appellant herein to be incarcerated in the penal complex for the balance of his natural life, and I would hope that the Board of Pardons would not commute the sentence so as to make him eligible to be released.

28-401. Murder in the first degree, defined; penalty. Whoever shall purposely and of deliberate and premeditated malice or in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or by administering poison, or causing the same to be done, kill another; or, whoever by willful and corrupt perjury or subornation of the same, shall purposely procure the conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the Nebraska Penal and Correctional Complex during life. The punishment shall be determined and fixed in the manner provided by sections 29-2520 to 29-2524.

28-420. Administering poison, drugs, or foreign substances; placing harmful objects in edible substances; violation; penalty. Whoever shall administer any poison, narcotic, hallucinogenic drug, or other foreign substance to another or who shall place any pin, needle, razor blade, glass or other harmful object in any food, candy, confectionery, or other edible substance with the intent to destroy, maim, alter the mental processes or ability, or take the life of the person or persons to whom the same shall be administered or by whom the substance shall be eaten, or do him, her or them an injury, or whoever shall mix any poison, narcotic, hallucinogenic drug, or other foreign substance in water, food, drink or medicine or who shall place any pin, needle, razor blade, glass or other harmful object in any food, candy, confectionery, or other edible substance with the aforesaid intent shall be guilty of a felony and shall, upon conviction thereof, be imprisoned in the Nebraska Penal and Correctional Complex for not more than ten years, or be fined not more than ten thousand dollars, or be both so fined and imprisoned. The presence of such harmful objects in any edible substance shall be a rebuttable presumption that the objects were intentionally placed therein. The provisions of this section shall not apply to the administration of any drug for medicinal purposes by or under the direction of any person licensed under the provisions of Chapter 71, article 1 when acting in his professional capacity.

29-2519. Statement of intent. The Legislature hereby finds that it is reasonable and necessary to establish mandatory standards for the imposition of the sentence of death; that the imposition of the death penalty in every instance of the commission of the crimes specified in section 28-303 fails to allow for mitigating factors which may dictate against the penalty of death; and that the rational imposition of the death sentence requires the establishment of specific legislative guidelines to be applied in individual cases by the court. The Legislature therefore determines that the death penalty should be imposed only for the crimes set forth in section 28-303 and, in addition, that it shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29-2520 to 29-2524.

29-2520. Murder; person found guilty; sentence; determination. Whenever any person is found guilty of a violation of section 28-303, the district court shall within seven days fix a date for hearing on determination of the sentence to be imposed. Such determination shall be made by: (1) The judge who presided at the trial or who accepted the plea of guilty; (2) a panel of three judges including the judge who presided or accepted the plea, the two additional judges having been designated by the Chief Justice of the Supreme Court after receiving a request therefor from the presiding judge; or (3) a panel of three district judges named by the Chief Justice of the Supreme Court when such Chief Justice has determined that the presiding judge is disabled or disqualified after receiving a suggestion of such disability or disqualification from the clerk of the court in which the finding of guilty was entered.

29-2521. Determination of sentence; procedure. In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The court shall set forth the general order of procedure at the outset of the sentence determination proceeding.

29-2521.01. Legislative findings. The Legislature hereby finds that:

(1) Life is the most valuable possession of a human being, and before taking it, the state should apply and follow the most scrupulous standards of fairness and uniformity;

(2) The death penalty, because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria;

(3) State law should be applied uniformly throughout the state and since the death penalty is a statewide law an offense which would not result in a death sentence in one portion of the state should not result in death in a different portion;

(4) Charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results; and

(5) In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

29-2521.02. Criminal homicide cases; review and analysis by Supreme Court; manner. The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur.

29-2521.03. Criminal homicide cases; appeal; sentence; Supreme Court review. The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

29-2521.04. Criminal homicide cases; Supreme Court review and analyze; district court; provide records. Each district court shall provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

29-2522. Sentence; death; life imprisonment; determination of death in writing. After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

29-2523. Aggravating and mitigating circumstances, defined. The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

29-2524. Existing procedures; act does not repeal. Nothing in sections 24-342, 28-303, 28-313, 29-2519 to 29-2546 and sections 29-2521.01 to 29-2521.04 shall be in any way deemed to repeal or limit existing procedures for automatic review of capital cases, nor shall it in any way limit the right of the Supreme Court to reduce a sentence of death to a sentence of life imprisonment in accordance with the provisions of section 29-2308, nor shall it limit the right of the Board of Pardons to commute any sentence of death to a sentence of life imprisonment.

29-2524.01. Criminal homicide; report filed by county attorney; contents. Each county attorney shall file a report with the State Court Administrator for each criminal homicide case filed by him. The report shall include (1) the initial charge filed, (2) any reduction in the initial charge and whether such reduction was the result of a plea bargain or some other reason, (3) dismissals prior to trial, (4) outcome of the trial including not guilty, guilty as charged, guilty of a lesser included offense, or dismissal, (5) the sentence imposed, (6) whether an appeal was taken, and (7) such other information as may be required by the State Court Administrator. Such report shall be filed not later than thirty days after ultimate disposition of the case by the court.

29-2524.02. State Court Administrator; criminal homicide report; provide forms. The State Court Administrator shall provide all forms necessary to carry out sections 29-2524.01 and 29-2524.02.

29-2525. Punishment is capital; appeal; clerk of district court; transcript; prepare; file; no charge; Clerk of Supreme Court; writ of error; issue. In cases when the punishment is capital, no petition in error shall be required and within the time prescribed by section 25-1931 for the commencement of proceedings for the reversing, vacating, or modifying of judgments, the clerk of the district court in which the conviction was had shall prepare and file with the Clerk of the Supreme Court a transcript of the record of the proceedings, for which no charge shall be made. The Clerk of the Supreme Court shall, upon receipt of the transcript, issue a writ of error. Such writ shall be returnable before the Supreme Court and the payment of a docket fee shall not be required.

29-2528. Conviction; punishment is capital; writ of error; suspension of execution; hearing. In all cases of conviction when the punishment shall be capital, the judges or court shall allow such writ of error as a matter of right, and shall order a suspension of the execution until such writ of error shall be heard and determined. Upon hearing such writ of error, it shall order the prisoner to be discharged, a new trial to be had, or appoint a day certain for the execution of the sentence, as the nature of the case may require.

THE CONSTITUTION OF THE UNITED STATES

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 81-5048

STEVEN ROY HARPER,

Petitioner,

v.

THE STATE OF NEBRASKA,

Respondent.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The Petitioner, Steven Roy Harper, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of the State of Nebraska without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's Affidavit in support of this Motion, with certified copies of previous orders in this regard from the District Court of Douglas County, Nebraska, is attached hereto.

STEVEN ROY HARPER, Petitioner,

By _____

STANLEY A. KRIEGER
Assistant Public Defender
306 Hall of Justice
Omaha, Nebraska 68183
One of His Attorneys

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STEVEN ROY HARPER, Petitioner, vs. THE STATE OF NEBRASKA, Respondent.	)	NO. AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Steven Roy Harper, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed by petition for writ of certiorari to the Supreme Court of the State of Nebraska without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor and that I believe I am entitled to redress.

That I was convicted by the District Court of Douglas County, Nebraska at trial by jury of two counts of first degree murder and three counts of poisoning with intent to kill, wound or maim and was sentenced to death on each first degree murder charge and consecutive ten years on each poisoning charge. I am presently incarcerated in the Nebraska Penal and Correcti nal Complex in Lincoln, Nebraska.

That in the District Court of Douglas County, Nebraska I requested the Court to appoint counsel since I was unable to afford the cost of an attorney or other costs arising out of the charges against me and that the Douglas County District Court did, upon my request, appoint the Douglas County Public Defender's Office to represent me in the matter of the criminal charges pending against me.

That upon my appeal to the Supreme Court of Nebraska, I continue to be represented by the Douglas County Public Defender's Office since I was unable to bear the costs of continued legal action in this case.

Because of my present incarceration in the Nebraska Penal and Correctional Complex on two sentences of death and sentences of ten years each on the poisoning counts, I am not employed nor do I have any cash or assets with which to finance proceedings in my case.

I understand that false statements in this Affidavit will subject me to penalties for perjury.

Steven Roy Harper

STEVEN ROY HARPER

SUBSCRIBED AND SWORN to before me this 8th day of July, 1981.

James R. Lyons

Notary Public

GENERAL NOTARY - State of Nebraska
JAMES R. LYONS
My Comm. Exp. July 7, 1983

IN THE COUNTY COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, vs. STEVEN Roy HARPER, Defendant.

DOC. 104 NO. 228

POVERTY AFFIDAVIT

STATE OF NEBRASKA)
) SS
COUNTY OF DOUGLAS)

The undersigned, being first duly sworn on oath, deposes and states that I am the defendant in the above-entitled cause of action, that I am without adequate funds or property of any kind which I can use to defend myself, and that, therefore, I request that the costs and fees in connection with my case be charged to Douglas County, Nebraska, for the reason that I am unable to pay said costs.

Further, I request appointment of counsel to represent me and to advise me as to my rights under the law.

Steven Harper
Defendant

SUBSCRIBED AND SWORN to before me this 27 day of Feb, 19___.

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
FEB 27 1979
CLERK

THE STATE OF NEBRASKA,	Plaintiff,		INFORMATION:
			First Degree Murder -
vs		104-228	Two Counts and
			Poisoning, Three Counts
Steven Roy Harper,	Defendant,		

Hearing on defendant's motion for setting of bail.

Motion denied.

G. D. Luckert reporting.

D. Herzog's motion to withdraw granted.

Public Defender appointed to represent defendant.

JAMES M. MURPHY, JUDGE

THE STATE OF NEBRASKA,)
) SS.
COUNTY OF DOUGLAS.)

I, RUDY J. TESAR, Clerk of the District Court, Fourth Judicial District of Nebraska, within and for said County, do hereby certify that the above and foregoing are true and correct copies of POVERTY AFFIDAVIT and ORDER filed for and entered into record and designated as Criminal Docket 104 Number 228,

in a cause in said Court wherein THE STATE OF NEBRASKA, is Plaintiff,

and STEVEN ROY HARPER, is Defendant.

as the same appears fully upon the records and in the files of said Court now in my charge remaining as Clerk aforesaid.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Omaha, Nebraska, this 6th day of July A. D. 1981

RUDY J. TESAR
Clerk

BY Robert J. Swatek
Deputy

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

STEVEN ROY HARPER,

Petitioner,

v.

THE STATE OF NEBRASKA,

Respondent.

ENTRY OF APPEARANCE

The Clerk will enter my appearance as counsel for Steven Roy Harper, Petitioner.

I certify that I am a member of the Bar of the Supreme Court of the United States.

STEVEN ROY HARPER, Petitioner,

By _____

STANLEY A. KRIEGER
Assistant Public Defender
306 Hall of Justice
Omaha, Nebraska 68183
(402) 444-7175 or
(402) 346-2266
One of His Attorneys

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

STEVEN ROY HARPER,

Petitioner,

v.

THE STATE OF NEBRASKA,

Respondent.

CERTIFICATE

IT IS HEREBY CERTIFIED that a true copy of the Petition for Writ of Certiorari to the Supreme Court of Nebraska was sent to Paul Douglas, Nebraska Attorney General, State Capitol Building, Lincoln, Nebraska 68509, this 10th day of July, 1981 by United States Mails, postage prepaid.

STEVEN ROY HARPER, Petitioner,

By _____

STANLEY A. KRIEGER
Assistant Public Defender
306 Hall of Justice
Omaha, Nebraska 68183
One of His Attorneys

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STEVEN ROY HARPER, Petitioner, vs. THE STATE OF NEBRASKA, Respondent.	)	NO. AFFIDAVIT OF COUNSEL

COMES NOW Stanley A. Krieger, Attorney for the Petitioner, and being duly sworn, deposes and states as follows:

1. That I have previously represented petitioners who had filed Petitions for Writs of Certiorari in capital cases in the cases of Rust v. Nebraska and Holtan v. Nebraska (joint petition #77-5257) which was denied on October 17, 1977 (434 U.S. 912), and rehearing denied on December 5, 1977 (434 U.S. 988).

2. Subsequent to those cases, I have had no contact with the Court.

3. Upon the rendition of the judgment of the Nebraska Supreme Court in the case of Steven Roy Harper, I consulted the Rules of the Supreme Court which had been previously requested and received in August, 1979 from the Clerk's office. I relied on those Rules which provided for 90 days to file a Petition for a Writ of Certiorari.

4. It came to my attention in June, 1981 that new Rules have been promulgated by the Court one year earlier, effective June 30, 1980, which reduce the time to file a Petition for Writ of Certiorari from 90 days after final judgment to 60 days after final judgment. When this became known to me, the 60 days provided for in the present Rules had just expired.

5. That I was not willfully ignoring the Rules of this Court, but was unaware of the new Rules and was relying on the old Rules in determining the time available to file the Petition for Writ of Certiorari.

Further, affiant sayeth not.

STANLEY A. KRIEGER

SUBSCRIBED AND SWORN to before me this 10th day of July, 1981.